80-413

No. [redacted]

Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GREAT LAKES CARBON CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DICKSON R. LOOS
POPE BALLARD & LOOS
700 Brawner Building
888 Seventh Street, N.W.
Washington, D.C. 20006
(202) 298-8600

G. CARROLL STRIBLING
Counsel of Record
W. W. DALTON
FORDYCE & MAYNE
120 South Central Avenue
Suite 1100
Clayton, Missouri 63105
(314) 863-6900

Attorneys for Respondent
Great Lakes Carbon Corporation

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

The sole question presented to the Supreme Court is whether a judgment entered by a district court, in a matter over which the Court has general subject matter jurisdiction, as well as jurisdiction over the parties, is subject to attack as void by motion under 60(b)(4) after the litigant has failed to effect a timely appeal under the terms of Rule 4(a) of the Rules of Appellate Procedure.

* * *

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Statutory Provisions Involved	2
Statement of the Case	5
Reasons for Denying the Petition	7
Conclusion	13

TABLE OF AUTHORITIES

Cases Cited

B. F. Goodrich Co. v. Northwest Industries, Inc., 424 F.2d 1349, (3d Cir. 1920), Certiorari Denied, 400 U.S. 822	9
ITT Industrial Credit Company v. Lawco Energe, 86 F.D.R. 708, l.c. 711, 712 D.C.S.D.W.Va. 1980	8
Kansas City Southern Railway Company v. Great Lakes Carbon Corporation, 462 F. Supp. 21 (D.C.E.D. Mo. 1978)	1,2,6

Kansas City Southern Railway Company v. The Honorable H. Kenneth Wangelin, U.S. District Judge, 582 F. 2d 1288 (8th Cir. 1978), (unpublished opinion, Appendix A-1 this brief) 1,5

Kansas City Southern Railway Company, Appellant v. Great Lakes Carbon Corporation, Appellee, 624 F.2d 822, (8th Cir. 1980) 1,5,6,7

Penn Central Company v. General Mills, Inc., 439 F.2d 1338 (8th Cir. 1971) 12

Schwartz v. Bowman, 244 F.Supp. 51 (D.C.N.Y. 1965) Aff'd 360 F.2d 211, Certiorari Denied, 385 U.S. 921 9

Southern Pacific Transportation Company v. United States, 454 F.2d 740 (C. of C. 1972) 12

State of North Dakota ex rel. Lemke v. Chicago & NW Ry., 257 U.S. 485, 42 S. CT. 170 (1922) 9

W. F. Brown & Sons Lumber Company v. L & N R. Company, 82 F.2d 94 (6th Cir. 1936), Aff'd 299 U.S. 393, 57 S. Ct. 265, 81 L. Ed. 301 12

Statutes and Rules Cited

28 U.S.C. §1336(a)(b) 2,11

28 U.S.C. §1337 2,11

49 U.S.C. §16 3,11

49 U.S.C. §6(7) 3,5

Rule 4(a), Federal Rules of Appellate Procedure 4,5,11

Rule 59, Federal Rules of Civil Procedure 4,5

Rule 60(b)(4), Federal Rules of Civil Procedure 1,6 7,8,10,11,A-2,A-4

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GREAT LAKES CARBON CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Petitioner omitted from the opinions and Judgments delivered in the Courts below the *Per Curiam* opinion dated August 31, 1978, of the United States Court of Appeals for the Eighth Circuit in *Kansas City Southern Railway Company, Petitioner* v. *The Honorable H. Kenneth Wangelin, U.S. District Judge for the Eastern District of Missouri, Respondent,* Cause No. 78-1603, on Petitioner's Petition for Writ of Mandamus, 582 F. 2d 1288 (1978) (a copy of that unpublished opinion is included as an Appendix to this brief, A-1); the Memorandum and Order of the District Court dated December 21, 1978, denying Petitioner's Motion under 60(b)(4) (a copy of which appears in the Appendix to this brief, A-4) and the citations to the Memorandum and Final Judgment entered by the District Court on Respondent's Counterclaim, April 25, 1978, *Kansas City Railway Company* v. *Great Lakes Carbon Corporation,* No. 75-808C(2), 462 F. Supp. 21, (1978) and to *Kansas City*

Southern Railway Company, Appellant, v. *Great Lakes Carbon Corporation, Appellee,* No. 79-1075, 624 F.2d 822 (1980), in which the Court of Appeals affirmed the judgment of the District Court.

STATUTORY PROVISIONS INVOLVED

United States Code Title 28

Section 1336. Interstate Commerce Commission's orders

(a) Except as otherwise provided by Act of Congress, the district court shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

June 25, 1948, c. 646, 62 Stat. 931; Aug. 30, 1964, Pub. L. 88-513, §1, 78 Stat. 695; Jan. 2, 1975, Pub. L. 93-584, §1, 88 Stat. 1917.

Section 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

June 25, 1948, c. 646, 62 Stat. 931.

Title 49, Section 16. Limitation of Actions

(3)(a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

(c) For recovery of overcharges action at law shall be begun or complaint filed within the commission against carriers subject to this chapter within three years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

§6, par. (7). Transportation without filing and publishing rates forbidden; rebates, privileges. No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed

and in effect at the same time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. Feb. 4, 1887, c. 104, Pt. I, §6, 24 Stat. 380; Mar. 2, 1889, c. 382, §1, 25 Stat. 855; June 29, 1906, c. 3591; §2, 34 Stat. 586; Feb. 28, 1920, c. 91; §411, 41 Stat. 483; Aug. 9, 1935, c. 498, §1, 49 Stat. 543.

Rules of Civil Procedure

Rule 59

New Trials; Amendment of Judgments

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.

Rules of Appellate Procedure

Rule 4

Appeal as of Right - When Taken

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date

on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

STATEMENT OF THE CASE

In order that the Court may be fully informed as to the issues and the particular matters involved in the Opinion and Judgment below, *Kansas City Southern Railway Company* v. *Great Lakes Carbon Corporation,* 624 F. 2d 822, it is necessary that the Respondent add the following:

The Counterclaim, an action for money and the subject of the appeal, was filed in the District Court pursuant to Section 1337 of Title 28 and Section 6(7) and 16(3) of Title 49, U.S.C. (Record Appendix 8-23, 37). Neither the Counterclaim nor the Reply, (Appendix 27-28 to the Record) filed thereto involved the justness or reasonableness of those rates or any other issue within the exclusive and primary jurisdiction of the Interstate Commerce Commission.

On April 25, 1978, the District Court awarded Judgment to Great Lakes Carbon Corporation on the Counterclaim (462 F. Supp. 21 Record Appendix 167-173). The Kansas City Southern made no effort, by Rule 59 of the Rules of Civil Procedure, to alter or amend the Judgment and as it took no appeal from the Judgment by resort to Rule 4(a) of the Rules of Appellate Procedure the Judgment became final on May 26, 1978.

After permitting the Judgment to become final, the Petitioner filed a Petition for a Writ of Mandamus with the Court of Appeals for the Eighth Circuit on August 21, 1978, which sought a direction to the District Court to enter an additional order so as to permit a late appeal (Record Appendix 180-188). In denying this Petition filed by the Petitioner, the Appellate Court, in the *Kansas City Southern Railway Corporation, Petitioner* v. *The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri, Respondent,* No. 78-1603,

582 F. 2d 1288, September 8, 1978 (the unpublished opinion) found that the Petition was an attempt to file an untimely appeal from the Final Judgment entered on the Counterclaim and that implicit in that Final Judgment was a ruling that the District Court had jurisdiction to rule on that claim. (Record Appendix 190-192; Appendix A-1 to this brief).

The Petitioner then filed its motion under Rule 60(b)(4) with the District Court on October 31, 1978, which motion the Court denied by Memorandum and Order (a copy of the Memorandum and Order appear in the Appendix A-4 to this brief). Upon appeal from the denial of the motion, a panel of judges of the Court of Appeals reviewed and remanded the case to the District Court and in doing so authorized the parties to "seek judicial review of the ICC Order by amending the pleading in the action now pending in the District Court to include the United States as a party defendant," (Petitioner's Appendix A-31).

To the decision of the panel Respondent filed a Petition for Rehearing with a Request for Rehearing En Banc, which was granted. After oral argument on hearing by the Court en banc, the opinion of the panel was ordered vacated and the District Court Judgment affirmed. The views of the majority of the Court were concurred in by four judges, one of whom concurred for an additional reason. Petitioner's statement on page 9 of its Petition that "one concurred on unrelated grounds" is directly contrary to the record (Petitioner's Appendix A-52, 53) *Kansas City Southern Railway* v. *Great Lakes Carbon Corporation,* (624 Fed. 2d 822, 826-827) which shows that Judge Ross concurred in the majority opinion "not only for the reasons stated, but also for an additional reason," which he then stated.

REASONS FOR DENYING THE PETITION

The statement of questions presented in the petition is framed in a manner which might have been appropriate if the writ of certiorari were directed to a decision of the United States Court of Appeals on a timely appeal. However, no appeal was taken in this case. Thus, the sole issue is whether the judgment of a Federal District Court is void for want of jurisdiction. None of the issues presented in the petition directly address this point. The Court's interpretation of the scope of Rule 60(b)(4) is thoroughly in accord with well settled precedents throughout the Federal Circuits. Moreover, the suggestions made by Petitioner that there is a conflict in the Circuits with respect to the issue of reviewability of Interstate Commerce Commission orders is without substance. There is no conflict in the Circuits and there is no issue which involves public policy or the interaction between Federal Courts and administrative agencies. Under such circumstances, discretionary review by this Court is unwarranted and the petition should be denied.

I. The District Court's Judgment Was Not Void Under Rule 60(b)(4).

The Court of Appeals held that a judgment may be void where there is a plain usurption of power and when a Court wrongfully extends its jurisdiction beyond the scope of its authority. A void judgment is one which, from its very inception, was legally ineffective, *Kansas City Southern Railway Company* v. *Great Lakes Carbon Corporation* (624 F. 2d 822-l.c.825, Petitioner's appendix A-49-56). By contrast, the issue presented to the Court by the counterclaim was whether or not Great Lakes Carbon was entitled to recovery of overcharges collected by the railway company. There is no dispute that the Court had jurisdiction.

The Court did not decide whether or not the District Court's judgment amounted to a "review" of an Interstate Commerce Commission order, or whether the Interstate Commerce Com-

mission had primary jurisdiction over the issue which was referred to it, or whether the District Court erred in entering its judgment without first joining the United States as a party. The Court "assumed" that Kansas City Southern was correct on its contentions, but held that they could not be raised in a proceeding to set aside a judgment as void under Rule 60(b)(4).

A motion under subdivision (b) of Rule 60 does not affect the finalty of a judgment or suspend its operation. To permit a delinquent party after final judgment to use a motion under Rule 60(b)(4) as a substitute for a timely appeal as required by Rule 4(a) of the Rules of Appellate Procedure would lead to absurd results (*ITT Industrial Credit Company* v. *Lawco Energy,* 86 F.D.R. 708, l.c. 711, 712 D.C.S.D.W.Va. 1980).

The District Court, in the exercise of its jurisdiction over the action, ruled against all of Petitioner's contentions, including the issue of the District Court's own jurisdiction to hear and decide the case. As demonstrated by the majority, the grounds upon which Petitioner belatedly sought relief under Rule 60(b)(4) were unsound and, on their face, presented only contentions which should have been presented by timely appeal or other direct action for review. As pointed out by the Court, these issues do not demonstrate the complete lack of jurisdiction which must be shown in order to rely on Rule 60(b)(4) (624 F. 2d 822, l.c. 825, Petitioner's appendix A-50-51).

II. There is No Conflict With Other Decisions Over The Proper Interpretation Of The Urgent Deficiencies Act.

An interpretation of the Urgent Deficiencies Act was not involved in this case. The Court announced at the outset of its opinion that it assumed, without deciding, that the United States was required to be joined as a party pursuant to 28 U.S.C. 2322. Kansas City Southern implies that the Court ruled that the United States was not a necessary party in an action to review an order the Interstate Commerce Commission of this

nature. But the Court of Appeals brushed aside the question of whether, in fact, the District Court's judgment was a review of an Interstate Commerce Commission order, or whether the action was one for the payment of money where the United States is not an indispensable party. It held that, assuming these things were true, the Court nevertheless had jurisdiction over the subject matter and the parties and thus the judgment was not void.

Moreover, none of the cases cited by the railway company in support of its contention that there is a conflict of interpretation in other circuits has any application to the facts here.

The three cases relied on by the railway company are not germaine to any of the issues which were presented in this litigation. *B.F. Goodrich Company* v. *Northwest Industries, Inc.*, 424 F. 2d 1349, (3rd Cir., 1970) involved a collateral attack by the Plaintiff against an order of the Interstate Commerce Commission involving acquisition proceedings under Section 5 of the Interstate Commerce Act. *Schwartz* v. *Bowman,* 244 F. Supp. 51 (D.C.N.Y. 1965) involved an action for injunctive relief under the Investment Company Act which also constituted a collateral attack against an order of the Interstate Commerce Commission. *North Dakota Ex Rel. Lemke* v. *Chicago N.W. Ry.*, 257 U.S. 485 involved an action by a state against a railway company also indirectly attacking an order of the interstate Commerce Commission.

In each case, an issue had been decided by the Interstate Commerce Commission in the first instance, and the Interstate Commerce Commission held that it had jurisdiction to make the determination called for. Rather than filing an appeal under the Urgent Deficiencies Act, in each instance, the party dissatisfied with the Commissioner's order, sought to file suit in a Federal Court indirectly attacking the Commission's jurisdiction to issue the order. The Appellate Courts decided that the question of whether the Commission correctly decided the jurisdictional issues involved in those cases must be resolved by appeal - not by collateral attack (*Schwarts* v. *Bowman,* 244 F. Supp. at p. 69).

In this case, the exact opposite situation is presented. The issue was presented to the Federal Court for determination - not to the Commission. The Federal Court sought advice from the Interstate Commerce Commission over certain issues on the basis that they may be within the Commission's primary jurisdiction. After receiving the Commission's advice, the Court proceeded to make its own determination with respect to the validity of a claim for damages and with respect to its jurisdiction over the issues referred to the Commission. Whether the Court decided these issues correctly did not oust the Court of jurisdiction. The proper manner to determine whether the District Court's judgment was erroneous was by appellate procedures. Thus, the decision of the Eighth Circuit involved completely different circumstances. There was no collateral attack against a Commission order and the case was presented to the Court in the first instance. Under these conditions, it is obvious that the majority decision in this case was thoroughly consistent with the rationale of the cases cited by Petitioner.

III. The Decision in No Way Countenaces Unwarranted Acquisition and Exercise of Jurisdiction by the Trial Court.

The Petitioner urges that "when this Court is presented with questions involving the exercise by the lower courts of jurisdiction it has a dual role: that of interpreter of the law and that of supervisor of the conduct of those lower courts." However, the petition wholly fails to point out where and in what respect that admonition was any reference to the opinion of the Eighth Circuit in this cause.

IV. The Decision Does not Render Rule 60(b)(4) A Nullity.

In urging consideration of its proposition number 3, the Petitioner does violence not only to the record, but to the decision of the Court of Appeals as well. The record clearly discloses, and the opinion of the Court of Appeals notes, that the District Court was vested with the power to deal with this type of case

and had acquired jurisdiction over the parties. Furthermore, at the time the District Court authorized the parties to seek the views of the Interstate Commerce Commission the time had passed within which that agency could have issued a valid and enforceable order for the payment of overcharges under Section 16 of Title 49 U.S.C.A.* Not only did the District Court have jurisdiction to enter the order for the payment of money under Section 1337 of Title 28, but by statute under Section 1336(a) of Title 28, it had penary jurisdiction over any civil action involving any order of the Interstate Commerce Commission. If it erred in the manner in which it exercised that authority, the rules prescribed for timely after-trial motions by which matter could have been called to the court's attention and brought to the attention of the Court of Appeals under Rule 4(a) of the Rules of Appellate Procedure. The fact that the Petitioner elected not to proceed by timely motion or by appeal does not in any way nullify Rule 60(b)(4) for its appropriate use.

V. The Fact That a Rehearing was Granted and a Different Decision Rendered by the Court of Appeals En Banc Does not Indicate a Need for Review by This Court.

Only the judges of the United States Court of Appeals can give an authoritative answer as to the reasons why the Motion for Rehearing was considered by that Court En Banc. In fact, the case involved only the construction of tariffs which were no longer in effect when the case was heard in the District Court (Record Appendix 162).

We submit that it is more reasonable to assume that the decision was reviewed by the Court of Appeals En Banc because the opinion of the division was in conflict with the earlier decisions

---

* The Counterclaim involved shipments moving between June 2, 1972 - February 3, 1973. The Order of the District Court was made June 3, 1976.

of that court in *Penn Central Company* v. *General Mills, Inc.*, 439 F. 2d 1338, l.c. 1340, 1341 (8th Cir. 1971), l.c. 340, 341 and the Court of Appeals for the Sixth Circuit in *W.F. Brown & Sons Lumber Co.* v. *L & N R. Co.*, 82 F. 2d 94, l.c. 95 (6th Cir. 1936), aff'd 229 U.S. 393 l.c. 399-400 57 S. Ct. 265, 81 L. Ed 301 l.c. 305 (1936) and *Southern Pacific Transportation Co.* v. *United States,* 454 F. 2d 740 l.c. 744, 745 (C. of C. 1972). We submit that the purpose of the rehearing en banc was to bring the opinion of the decision in line with these controlling authorities which indeed the majority of the Court proceeded to do. This was accomplished by a determination that a ruling on such questions was not necessary to resolve the issues.

CONCLUSION

Inasmuch as Respondent's action at law for overcharges has been in litigation more than five years and no appeal was taken from the money judgment entered in its favor in April of 1978 by the District Court, which had statutory jurisdiction under the parties involved as well as the subject matter, the tardy objection as to the manner in which the Court has exercised its statutory jurisdiction is without merit.

The Petition for a Writ of Certiorari should be denied because it raises not issue of any merit or substance.

Respectfully submitted,

DICKSON R. LOOS
POPE BALLARD & LOOS
700 Brawner Building
888 Seventh Street, N.W.
Washington, D.C. 20006
(202) 298-8600

G. CARROLL STRIBLING
W. W. DALTON
FORDYCE & MAYNE
120 South Central Avenue
Suite 1100
Clayton, Missouri 63105
(314) 863-6900

Attorneys for Respondent
Great Lakes Carbon
Corporation

AFFIDAVIT

STATE OF MISSOURI
} SS.
COUNTY OF ST. LOUIS

W. W. Dalton, of lawful age, a member of the Bar of the Supreme Court of the United States, upon oath, states that he is an attorney for Respondent in the case of

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner, vs. GREAT LAKES CARBON CORPORATION, Respondent, No. 80-413,

and that on the ____ day of October, 1980, he mailed, postage prepaid, the following number of copies of Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, addressed to the following named persons at the addresses shown:

40 copies to: Hon. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Supreme Court Building
One First Street, NE
Washington, D.C. 20543

3 copies to: Robert K. Dreiling, Attorney at Law,
Counsel of Record for The Kansas CIty
Southern Railway Company
114 West 11th Street
Kansas City, Missouri 64105

_____
W. W. Dalton

Subscribed and sworn to before me this ____ day of October, 1980.

My Commission expires:

_____.

_____
Notary Public

APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 78-1603

The Kansas City Southern Railway Company,

Petitioner,

v.

The Honorable H. Kenneth Wangelin, U.S. District Judge for the Eastern District of Missouri,

Respondent.

On Petition for Writ of Mandamus

Submitted: August 31, 1978
Filed: September 8, 1978

Before LAY, ROSS and STEPHENSON, Circuit Judges.

PER CURIAM.

Kansas City Southern Railway Company petitions this court for a writ of mandamus directing the district court, The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri, to rule on its motion for summary judgment on a counterclaim in order to enable it to file a notice of appeal.

On April 25, 1978, the district court entered an order granting the Railway Company's motion for summary judgment on its complaint against Great Lakes Carbon Corporation. Judgment was entered in favor of the Railway Company in the amount of $29,898.32 plus interest. The court also granted Great Lakes'

motion for summary judgment on its counterclaim, and entered judgment in favor of Great Lakes in the amount of $129,026.47 plus interest. Neither party appealed from the judgment. On or about June 21, 1978, the Railway Company requested the district court to enter a final judgment on the Railway's motion for summary judgment on the counterclaim pursuant to either Fed.R.Civ.P. 54(b) or 60(a) in order that petitioner might assert its position affirmatively on appeal. Upon the district court's refusal to do so the petition for a writ of mandamus was filed in this court. We deny the petition; we think it obvious that petitioner is attempting to belatedly amend the final judgment of April 25, 1978, in order to file an untimely appeal.

The Railway Company argues in support of its petition for a writ of mandamus that the district court order was not a final judgment because the court did not explicitly deny its motion for summary judgment on Great Lakes' counterclaim. The Railway urges that all claims were therefore not adjudicated, and since no certificate was issued under Fed.R.Civ.P. 54(b), the order of the district court was not an appealable final judgment. We disagree.

On April 25, 1978, the district court entered judgment on the Railway's claim for relief as asserted in its complaint, and simultaneously granted the claim for relief for Great Lakes on its counterclaim. In doing so, it is clear that the district court adjudicated all the claims and the rights and liabilities of all the parties. The judgment was therefore a final judgment. Certification pursuant to Rule 54(b) was not a prerequisite to filing a timely appeal.

The Railway Company asserts that its motion for summary judgment was based on the lack of subject matter jurisdiction of the district court to grant a summary judgment against Great Lakes. It urges that it could not have otherwise raised this jurisdictional ground for review without the district court passing on its summary judgment motion since the grant of sum-

mary judgment to Great Lakes affected only the merits of the counterclaim. We find this argument specious; by entry of judgment on the counterclaim, it is implicit that the court ruled it had jurisdiction over the claim. Furthermore, a challenge to subject matter jurisdiction affecting the judgment entered may always be raised on appeal relating to the merits of the claim.

As there is no reason for the district court to enter an additional order, the petition for writ of mandamus is denied.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

[Not to be published].

In the United States District Court For The
Eastern District Of Missouri
Eastern Division

The Kansas City Southern Railway Company,

Plaintiff,

vs.

Great Lakes Carbon Corporation,

Defendant.

No. 75-808 C (2)

MEMORANDUM AND ORDER

This matter is before the Court upon plaintiff's motion under Rule 60(b) of the Federal Rules of Civil Procedure for relief from the judgment and order of this Court filed April 25, 1978. Plaintiff in its motion contends that this Court did not have jurisdiction to try defendant's claims against plaintiff. The basis of plaintiff's motion addresses issues thoroughly considered by this Court in its opinion filed April 25, 1978, and from which plaintiff took no appeal.

After thorough reconsideration of the matter, this Court finds that plaintiff's motion is without merit. Consequently, plaintiff's motion for relief under Rule 60(b)(4) will be and is DENIED.

It is so Ordered.

Dated this 21st day of December, 1978.

/s/ H. KENNETH WANGELIN
United States District Judge